



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House  
Cnr 5<sup>th</sup> Street & Norwich Close, Sandton, 2196  
PO Box 651826, Benmore, 2010  
Tel (011) 884-8454 □ Fax (011) 884-1144  
E-Mail: [enquiries-jhb@pfa.org.za](mailto:enquiries-jhb@pfa.org.za)

Cape Town

2nd Floor, Oakdale House, The Oval  
Oakdale Road, Newlands, 7700  
P O Box 23005, Claremont, 7735  
Tel (021) 674-0209 □ Fax (021) 674-0185  
E-mail: [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

---

Please quote our reference: PFA/WE/11138/2006/LN

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – C D UYS (“the complainant”) v PRIVATE SECURITY SECTOR PROVIDENT FUND (“the respondent”)**

1. Introduction

1.1 The complaint concerns the distribution of a death benefit by the respondent following the death of its member, Mr J M Pretorius (“the deceased”).

1.2 The complaint was received by this office on 20 October 2006. A letter acknowledging receipt thereof was sent to the complainant on 20 November 2006. On the same date a letter was dispatched to the respondent giving them until 21 December 2006 to file their response to the complaint. A response was received from the respondent on 30 November 2006. This response was forwarded to the complainant on 10 January 2007. The complainant however omitted to reply.

1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Factual Background

2.1 The complainant is the mother of the deceased. The deceased was the member of the respondent from 1 November 2002 until he passed away on 22 December 2005. At the time of his death he was not married.

---

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), AP Lehana (Assistant Adjudicator), S Mokgara (Assistant Adjudicator), L Molete (Assistant Adjudicator), T Nawane (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat

Following his passing away a benefit in the amount of R30 218.86 became available for distribution to his beneficiaries.

- 2.2 The complainant alleges that she was nominated as the sole beneficiary by the deceased. However, the trustees paid the entire benefit in favour of a minor child to the exclusion of the complainant.
- 2.3 The complainant alleges further that there is no evidence to show that the deceased is the biological father of the minor child, since the deceased's name does not appear in the full unabridged birth certificate of the minor child. The complainant concludes by stating that the deceased contributed financially to her until his death.

### 3. Complaint

- 3.1 The complainant is unhappy about the trustees' decision to totally disregard or dismiss her nomination as a beneficiary.
- 3.2 The complainant objects to the distribution of the proceeds of the death benefit by the fund.

### 4. Response

- 4.1 This office received a response from the respondent.
- 4.2 The respondent states that the trustees' investigation established that the deceased member was not married at the time of his death. However, the respondent confirms that the trustees established that the deceased was maintaining a minor child, T D Jacobs.
- 4.3 The respondent states that the beneficiary nomination form is not regarded as a conclusive document on the status of the deceased's circle of beneficiaries. It states that dependency overrides and takes precedence over nomination forms. However, the respondent admits that the trustees are required to take a nomination form into consideration when deciding on the distribution process.
- 4.4 According to the respondent, in the allocation of death benefits, biological parenthood is not a deciding factor, especially if the evidence clearly shows that there are no legal dependants but there are factual dependants. The respondent states that the trustees felt that the age of the dependant and the amount of death benefit available for distribution weighed heavily in favour of allocating the entire benefit towards securing the future maintenance of the child. As a result the trustees resolved to set up a trust fund in favour of the minor child and pay the entire benefit

into the trust. The respondents states that the trustees considered it inappropriate to allocate the benefit in any other way.

- 4.5 The respondent concludes by stating that for this reason, the trustees are satisfied that they have effected the best possible distribution under the circumstances, which they consider to be fair and equitable.

5. Determination and reasons therefor

- 5.1 The minor child, T D Jacobs, who has a direct substantial interest in the matter, ordinarily would have been joined as the second respondent to the complaint and afforded an opportunity to comment on the allegations. However, in the light of the overall conclusion that this Tribunal has come to, it is unnecessary to join her as respondent to the complaint.

- 5.2 The payment of death benefits is regulated by section 37C of the Act read in conjunction with the definition of a dependant in section 1. The primary purpose of this section is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. It is the trustee's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the dependants, to thereafter decide on an equitable distribution and finally decide on the most appropriate mode of payment of the benefit.

- 5.3 It was established by the trustees that the complainant is the deceased's mother and also a nominee.

- 5.4 The duty of the Board of Trustees is to decide on an equitable distribution between the identified dependents and nominees. The board's duty in this regard was cogently summarised in *Sithole v ICS Provident Fund & Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:

"When making an "equitable decision" amongst dependants the board of management has to consider the following factors:

- The age of the dependants;
- The relationship with the deceased;
- The extent of dependency;
- The wishes of the deceased placed either in the nomination form and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential."

"In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way."

- 5.5 The nomination form is merely a guide to the trustees. Hussain J, in *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W), at 3705J – 3706B, observed the impact of a nomination form as:

“Section 37 (sic) of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37 (c) (i) (sic) specifically excludes the benefits from the assets in the estate of a member. Section 37(c) (sic) enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.”

- 5.6 In this matter, the trustees awarded the entire benefit to the minor child because of the age of the dependant minor child and the value of the benefit for distribution which was R30 218.86 to the exclusion of the complainant. The young dependant is likely to be dependent for a much longer time than an older one, in that he is likely to require more financial assistance than the complainant. The amount that is available for distribution is always a critical factor especially where there is more than one dependant.
- 5.7 The wishes of the deceased are often expressed in the nomination form or the will. In so far as the latter is concerned, pension fund benefits are expressly excluded from the deceased's estate. As for nominated beneficiaries, they are often under the erroneous belief that by virtue of them being nominated by the deceased member, they are entitled to the benefit. This is however not the case, since section 37C was enacted to protect dependency over the clear wishes of the deceased. The content of the nomination form is merely one of the factors taken into consideration by the trustees in the exercise of their discretion.
- 5.8 The duty of this tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund & Another* (2) [2001] 10 BPLR 2579 (PFA) at 2582F-G).
- 5.9 After considering all the information before me I am satisfied that the board had acted reasonably and properly in this case. The board is vested with a discretionary power to decide on an equitable distribution of a death benefit. It is trite law that only in instances where functionary has exercised its discretionary power unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be set aside. In the present matter, it cannot be said that the decision of the board was

not an honest one, nor can it be said that it was not reasonable in the circumstances. The board considered relevant factors and discarded irrelevant considerations. Therefore, no legal grounds exist for me to alter its decision.

6. Relief

6.1 In the result, the complaint is dismissed.

**DATED AT CAPE TOWN ON THIS            DAY OF            2008.**

Yours faithfully

---

**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR